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OFFICE OF PETITIONS

In re Application of :
Harrington et al. :
Application No. 09/513,997 : DECISION DISMISSING
Filed: 26 February, 2000 : PETITION
Attorney Docket No. 5817-7Q :

This is a decision on the petition filed under 37 CFR 1.53 on 18 March, 2002, which is treated as a petition under 37 CFR 1.53 and 1.10 requesting that the above-identified application be accorded a filing date of 25 February, 2000, instead of the presently accorded filing date of 26 February, 2000.

The petition is dismissed.

Petitioners allege that the application was deposited in USPS Express Mail service on 25 February, 2000.

In support, petitioners have supplied a copy of their itemized return postcard "indicating the date mailed as February 25, 2000." Petitioners also point to their application transmittal sheet and other documents as showing the date of deposit as 25 February, 2000.

Petitioner's arguments have been considered, but are not persuasive. The U.S. Patent and Trademark Office (Office) file is the official record of the papers originally filed in this application. A review of the papers originally filed reveals that no application papers were received on 25 February, 2000. An applicant alleging that a paper was filed in the Office and later misplaced has the burden of proving the allegation by a preponderance of the evidence. The fact that petitioner believes that the application was (or should have been) received in the Office on 25 February, 2000, is not more persuasive than the date the papers are shown to have been received in the official file.

Additionally, petitioners should note that the return receipt postcard serves as *prima facie* evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO, **not** the date petitioners placed on the card before mailing the application to the USPTO. Petitioners' postcard receipt shows a USPTO Office date stamp of 26 February, 2000. Therefore, the postcard receipt is *prima facie* evidence that the application was received on 26 February, 2000, not 25 February, 2000. Furthermore, at best, the date which petitioners placed on the return receipt postcard and application transmittal sheet prior to mailing show intent to file the application on 25 February, 2000, not the date the application was received in the USPTO.

With regard to the application being deposited by Express Mail, It is noted that the application transmittal sheet received with the application papers references Express Mail Label No. EL039496197US.

Paragraph (c) of 37 CFR 1.10 states that:

Any person filing correspondence under 37 CFR 1.10 that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show a discrepancy between the filing date accorded by the Office to the correspondence and the date of deposit as shown by the "date-in" on the "Express Mail" mailing label or other USPS notation, may petition the Commissioner to accord the correspondence a filing date as of the "date-in" on the "Express Mail" mailing label or other official USPS notation, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;

(2) The number of the "Express Mail" mailing label was placed on the papers or fees that constitute the correspondence prior to the original mailing by "Express Mail;" and

(3) The petition includes a true copy of the "Express Mail" mailing label showing the "date-in," and of any other official notation by the USPS relied upon to show the date of deposit.

At the outset, petitioners should note that in the absence of convincing evidence of the date of deposit, the application will be accorded a filing date as of the date of receipt in the

USPTO.¹ In this case, petitioners have failed to establish 25 February, 2000, as the date the application was **deposited with the USPS**.

The instant petition lacks the showing required by item (3). In regards to paragraph (3) above, petitioners have not submitted a true copy of the "Express Mail" mailing label showing the "date-in" and any other official notation by the USPS relied upon to show the date of deposit. A copy of the "Express Mail" mailing label must be included with any renewed petition under 37 CFR 1.10(c). Furthermore, a search of the USPTO's USPS Express Mail Information Database reveals that the application was accepted by the USPS on 26 February, 2000, rather than 25 February, 2000.

Additionally, petitioners' reliance on the certificate of mailing is not well taken because a certificate of mailing is no longer required under 37 CFR 1.10. At best, the certificate of mailing serves as evidence of petitioner's original intent to deposit the application in Express Mail on 25 February, 2000, not as evidence of the actual deposit of the application in Express Mail.

In summary, petitioners have not shown by a preponderance of the evidence that the application papers were received on 25 February, 2000. The petition is therefore dismissed.

As this petition is not due to an error on the part of the USPTO, the petition fee of \$130.00 will not be refunded.

The application is being returned to the Office of Initial Patent Examination for further processing with a filing date of 22 April, 2002, using the application papers filed on that date.

Telephone inquiries concerning this matter may be directed to the undersigned at (703)308-6918.



Douglas I. Wood
Senior Petitions Attorney
Office of Petitions

Attch: USPTO's USPS Express Mail Information Database printout

¹37 CFR 1.6(a).